

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
GAME SHOW NETWORK, LLC,)	MB Docket No. 12-122
Complainant,)	File No. CSR-8529-P
)	
v.)	
)	
CABLEVISION SYSTEMS CORP.,)	
Defendant)	

TO: The Commission

**CABLEVISION SYSTEMS CORPORATION’S OPPOSITION
TO GSN’S PETITION TO COMPEL COMPLIANCE
WITH THE INITIAL DECISION**

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Cablevision Systems Corporation (“Cablevision”) respectfully submits this opposition to the Petition of Game Show Network, LLC to Compel Cablevision’s Compliance With Initial Decision (the “Petition to Compel”).¹

PRELIMINARY STATEMENT

In its Petition to Compel, GSN seeks to impermissibly force Cablevision to comply with the Initial Decision prior to completion of administrative and judicial review, in contravention of the express language of the Initial Decision, well-established Commission precedent and procedure, the Administrative Procedure Act (“APA”) and the Due Process Clause. GSN’s Petition to Compel falls far short of showing why the Commission should take such an unprecedented step.²

First, the Initial Decision, on its face, does not compel Cablevision to comply immediately with the ordered relief. To the contrary, the Initial Decision provides that it “shall become effective . . . 50 days after release if exceptions are not filed within 30 days.”³ The plain language could not be clearer: the Initial Decision takes effect only *after* the expiration of 50

¹ *Game Show Network, LLC v. Cablevision Sys. Corp.*, Petition of Game Show Network, LLC to Compel Cablevision’s Compliance With Initial Decision, MB Docket No. 12-122, File No. CSR-8529-P (filed Dec. 8, 2016); *Game Show Network, LLC v. Cablevision Sys. Corp.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 16D-1 (ALJ Nov. 23, 2016) (“Initial Decision”). Cablevision’s opposition is timely filed in accordance with the Extension granted by the Commission. *Game Show Network, LLC v. Cablevision Sys. Corp.*, Order, DA 16-1430 (OGC 2016). Cablevision believes, and had confirmed with GSN, that but for this extension, its opposition would have been due 20 days after GSN’s Petition to Compel was filed, pursuant to 47 C.F.R. § 76.7(b)(1).

² Although Cablevision vigorously opposes GSN’s Petition to Compel, and believes it will ultimately prevail, it assures the Commission that should the Initial Decision be upheld, Cablevision will implement the remedy so-ordered by the ALJ in the Initial Decision. However, as further detailed in Cablevision’s Petition to Stay, Cablevision is highly likely to succeed on the merits of its challenges to the Initial Decision and it will suffer substantial prejudice if forced to comply at this premature juncture.

³ Initial Decision ¶ 126 n.534.

days, and, then, *only* if Cablevision, GSN, or the Enforcement Bureau (which opposed GSN’s Complaint) has not filed exceptions. That will not be the case here as Cablevision, at least, is timely filing its exceptions today.⁴

The Administrative Law Judge’s (“ALJ”) conditional deferral of the Initial Decision also aligns with the applicable Commission rule stating that “the timely filing of exceptions . . . shall stay the effectiveness of the initial decision.”⁵ The position advanced by GSN, that the decision should be implemented before Cablevision’s exceptions are considered and ruled upon by the Commission, would render that rule meaningless.

GSN’s contrary argument—that the ALJ recognized the importance of immediate relief when he ordered Cablevision to expand its carriage “as soon as practicable”—is not persuasive.⁶ If the ALJ had intended to impose such a requirement on Cablevision (assuming he had the authority to do so) he would not have designated the effective date as 50 days after release, subject to a further delay if exceptions were filed. That is particularly true given that the precise issue presented in GSN’s petition was briefed and considered by the Commission in *Tennis Channel*, where the MVPD in that proceeding, Comcast, relied upon identical language in

⁴ See *Game Show Network*, Order, DA 16-1430 ¶ 5; see also 47 C.F.R. § 1.276(d). Cablevision is not aware if the Enforcement Bureau has determined to file exceptions, although it is significant to note that the Initial Decision does not reflect the views of the Enforcement Bureau which, at the conclusion of a trial in which it fully participated, urged the ALJ to dismiss GSN’s carriage complaint. The Enforcement Bureau submitted that “GSN has not produced any direct evidence of unlawful affiliation-based discrimination” nor has it “satisfied the first prong of the circumstantial evidence test” by showing that GSN and Cablevision’s affiliated networks were similarly situated. *Game Show Network, LLC v. Cablevision Sys. Corp.*, Enforcement Bureau’s Comments ¶ 14, MB Docket No. 12-122 (Oct. 15, 2015). The Enforcement Bureau recommended a “decision finding that Cablevision has not violated Section 76.1301(c) of the Commission’s rules.” *Id.* ¶ 31.

⁵ 47 C.F.R. § 1.276(d).

⁶ Petition to Compel at 7.

the Initial Decision to oppose a similar petition to compel compliance, a petition that the Commission denied.⁷

Second, prematurely forcing Cablevision to comply with the Initial Decision before administrative review is complete would plainly violate the APA. The APA forbids the Commission from making the Initial Decision effective immediately because to do so would run afoul of the APA's requirement that the Decision be "inoperative" while Cablevision exhausts Commission review. But, through its Petition to Comply, GSN seeks a ruling that the Initial Decision be "operative" while that administrative appeal is pending. Such a result is inconsistent with the orderly requirements of the APA.

Third, the Due Process Clause of the Constitution does not permit the Initial Decision to take effect because the Commission has not yet considered at least two dispositive issues in this case: Cablevision's statute of limitations defense (which bars GSN's complaint in its entirety) and its First Amendment arguments (which bar the Initial Decision's mandatory carriage remedy).⁸ The legal and factual landscape has changed significantly since Cablevision first presented these issues to the Media Bureau in 2011. Indeed, the Commission has not yet had an opportunity to address either issue in light of the D.C. Circuit's 2013 *Tennis Channel* decision.⁹ Nor has the Commission considered the effect of Cablevision's change of ownership

⁷ In denying the petition to compel compliance, the Commission declined to decide the issue of the immediate effectiveness of the Initial Decision. *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Order, FCC 12-50, ¶ 6 n.25 (MB May 14, 2012). The same ALJ presided over both proceedings.

⁸ On December 23, 2016, Cablevision timely filed an Application for Review of the Media Bureau's decision on the statute of limitations issue, and today is filing its Exceptions to the Initial Decision, which lay out the First Amendment arguments in more detail.

⁹ See *Comcast Cable Commn's, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013) ("*Tennis Channel*").

in 2016, as a result of which Cablevision is no longer vertically integrated with any network at issue in this litigation. Both the Media Bureau and ALJ have declined to entertain the merits of Cablevision's First Amendment argument to date.¹⁰ Due process as well as fairness dictate that the Commission should consider these arguments before any remedy is considered for GSN.¹¹

Finally, GSN will suffer no real harm under the status quo, which has been in effect for the past six years. GSN is, as it admits, a thriving network and has been so at all times during the pendency of this carriage proceeding. Consistent with the marginal impact of Cablevision's carriage on its overall success, GSN made no effort before the ALJ to expedite this proceeding. On this record, and in light of the substantial errors of fact and law identified in Cablevision's Exceptions, there is simply no reason for the Commission to take the unprecedented step of forcing Cablevision to comply before the Commission has had the opportunity to review the Initial Decision and rule on the dispositive issues that Cablevision has raised. On the other hand, if Cablevision is forced to carry GSN prematurely, prior to Commission review, Cablevision's consumers will suffer potential confusion and will be forced to subsidize the costs of an unpopular network.¹²

¹⁰ See *Game Show Network, LLC v. Cablevision Sys. Corp.*, Hearing Designation Order, 27 FCC Rcd. 5113, 5121 n.62 (MB 2012); Initial Decision ¶ 118 n.526. The Media Bureau stated that the argument was "premature" when it issued the HDO in the case. HDO, 27 FCC Rcd. at 5121.

¹¹ Along with Cablevision's Opposition to GSN's Petition to Compel, Cablevision is also filing a Petition to Stay the Initial Decision ("Petition to Stay"). GSN's Petition to Compel should be denied for the reasons set forth herein but Cablevision is also entitled to a stay.

¹² See Petition to Stay at 25.

BACKGROUND

We refer to Cablevision’s Petition to Stay and its Exceptions for a full recitation of the facts, which we incorporate herein. Of particular relevance to GSN’s Petition to Compel:

In October 2011, more than nine months after the retiering and nearly a decade after the [REDACTED] renewal of the parties’ then-existing carriage agreement providing for at-will carriage, GSN filed a program carriage complaint asserting that Cablevision violated Section 616 of the Telecommunications Act by moving GSN from a basic tier of service to a premium tier.¹³ GSN also requested temporary relief from the Commission, claiming that the retiering would “cripple[e] GSN’s ability to develop its network” and cause “severe and likely irreparable harm to GSN’s . . . long-term viewership and competitiveness.”¹⁴ The Media Bureau rejected this request, noting that “GSN’s long delay in seeking equitable relief suggests that a stay is not necessary to prevent irreparable harm.”¹⁵ The Media Bureau then released the Hearing Designation Order (“HDO”) in this matter in May 2012.¹⁶

Following extensive fact and expert discovery, the matter was scheduled for an April 2013 trial when, with the consent of the ALJ, GSN and Cablevision agreed to postpone trial pending the resolution of the appeal in the *Tennis Channel* case. After the D.C. Circuit rendered its decision reversing the Commission’s finding of liability, the parties again agreed to

¹³ Initial Decision ¶¶ 1–2.

¹⁴ *Game Show Network, LLC v. Cablevision Sys. Corp.*, GSN’s Petition for Temporary Relief Pending Resolution of Program Carriage Complaint, File No. CSR-8529-P, at 7 (filed Oct. 12, 2011) (“Petition for Temporary Relief”). The trial record in this proceeding exposed the hyperbole in this prediction.

¹⁵ *Game Show Network, LLC v. Cablevision Sys. Corp.*, Order, DA 11-1993 ¶ 12 (MB Dec. 7, 2011).

¹⁶ Initial Decision ¶ 3.

postpone the trial to conduct further discovery and consider the decision’s impact.¹⁷ The ALJ conducted a hearing in July 2015 and heard closing arguments months later, in October 2015.

On November 23, 2016, the ALJ released the Initial Decision recommending a remedial provision requiring Cablevision to move GSN from a premium tier back to its expanded basic tier.¹⁸ Importantly, the Initial Decision provides that it “shall become effective and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days.”¹⁹

On December 8, 2016, 15 days *before* Cablevision’s Exceptions to the Initial Decision were due under the Commission’s rules, GSN filed its Petition to Compel, improperly requesting that the Commission direct Cablevision to comply with the Initial Decision prior to completion of administrative review.

¹⁷ *Game Show Network, LLC v. Cablevision Sys. Corp.*, Order, FCC 13M-12 (ALJ June 25, 2013).

¹⁸ Initial Decision ¶ 118. At no point during the year-long interval between closing arguments and the release of the Initial Decision did GSN request that the ALJ expedite the proceeding.

¹⁹ *Id.* ¶ 126 n.534 (citing 47 C.F.R. § 1.276).

ARGUMENT

I.

**THE INITIAL DECISION DOES NOT REQUIRE IMMEDIATE COMPLIANCE BY
CABLEVISION**

The plain text of the Initial Decision, as required by the Commission’s rules, clearly provides that the Initial Decision, including its remedial provisions, is stayed pending administrative review of the decision.

Under the Commission’s rules, any party, including Cablevision, is given 30 days to file exceptions to the Initial Decision.²⁰ The rules further state that “[t]he Commission may on its own initiative provide, by order adopted not later than 20 days after the time for filing exceptions expires, that an initial decision shall not become final, and that it shall be further reviewed or considered by the Commission.”²¹ Thus, “no initial decision shall become effective before 50 days after public release” and “the timely filing of exceptions . . . shall stay the effectiveness of the initial decision until the Commission’s review thereof has been completed.”²² The Commission has repeatedly and consistently held that an initial decision is not effective until the Commission has completed its administrative review.²³

²⁰ 47 C.F.R. § 1.276(a).

²¹ *Id.* § 1.276(b).

²² *Id.* § 1.276(d). The same rule similarly applies to actions taken on delegated authority that are subject to an application for review, such as the HDO in this matter. *See id.* § 1.102(a)(3) (“If an application for review of such final decision is filed . . . the effect of the decision is stayed until the Commission’s review of the proceeding has been completed.”).

²³ *See, e.g., RKO General, Inc. (KHJ-TV)*, Mem. Op. & Order, 3 FCC Rcd. 5057, 5062 (1988) (noting that the “partial initial decision . . . has been stayed until this Commission has completed its full review of the record and the legal conclusions to be drawn”); *see also R. Donnie Goodale*, 7 FCC Rcd. 7672, 7672 n.3 (1992); *The O.T.H.R., Inc.*, Mem. Op. & Order, 96 FCC 2d 551, 553 n.2 (Rev. Bd. 1984).

It is for this reason that the Initial Decision provides that it shall only “become effective and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days,” thus incorporating the express time limits for party and Commission review set forth in the Commission’s rules.²⁴ The ALJ’s order is quite clear: the Initial Decision will take effect 50 days after release unless a party or the Commission indicates the need for further review, in which case the Initial Decision is stayed until the Commission renders a final decision. That should be the result here, as Cablevision is filing today its Exceptions to the Initial Decision.

GSN’s Petition to Compel provides no reason to depart from the Commission’s rules and ordinary practice. The assertion that the ALJ anticipated immediate compliance is undermined by the text of the Initial Decision. Although the Initial Decision states that “Cablevision must proceed as soon as practicable with remediation . . . and forfeiture payment,”²⁵ this phrase can only be sensibly read to require Cablevision to “proceed as soon as practicable” *after* the Initial Decision takes effect following the completion of administrative and judicial review.²⁶ Had the ALJ intended to compel immediate relief—in contravention of prior practice and the Commission’s rules—he would have done so explicitly. Instead, by making the effectiveness of the Initial Decision conditional upon resolution of Cablevision’s Exceptions, the ALJ recognized that his decision could have no effect until Cablevision’s administrative review ran its course.

²⁴ Initial Decision ¶ 126 n.534 (citing 47 C.F.R. § 1.276).

²⁵ *Id.* ¶ 126.

²⁶ Indeed, the Commission’s rules explicitly state that if the effective date of an initial decision falls within the time for filing exceptions, the effective date “*shall be postponed automatically* until 30 days after time for filing exceptions has expired.” 47 C.F.R. § 1.276(d) (emphasis added).

The precise arguments on immediate compliance with the ALJ's carriage decision were made and rejected by the Commission in the *Tennis Channel* proceeding.²⁷ GSN's efforts to circumvent the Commission's prior ruling are unavailing. *First*, GSN's suggestion that the Commission somehow recognized that § 76.1302(j)(1) requires immediate compliance with a carriage order in a Section 616 proceeding is belied by the plain language of the decision. The Commission, in denying the petition to compel, stated only that it waived § 76.1302(j)(1) "to the extent necessary." The Commission did not, however, as GSN argues, find that such a waiver was in fact required. *Second*, to the extent that GSN purports to take solace in the Commission's observation that *Tennis Channel* represented the "first instance in which an MVPD had been ordered to carry a network under Section 616," that observation is still apt in light of the D.C. Circuit's reversal of the Commission's ruling; if allowed to stand after administrative and judicial review, the Initial Decision would in fact be the first to result in compelled carriage.

In short, under the Initial Decision's express terms and the Commission's own rules, GSN's Petition to Compel should be denied.

II.

REQUIRING IMMEDIATE COMPLIANCE WITH THE INITIAL DECISION WOULD VIOLATE THE APA

GSN argues that other Commission regulations require Cablevision's immediate compliance with the Initial Decision.²⁸ These arguments should be rejected because forcing

²⁷ *Tennis Channel, Inc.*, Order, FCC 12-50 at ¶ 6.

²⁸ See Petition to Compel at 6; 47 C.F.R. §§ 76.10(c)(2) (stating that in Part 76 proceedings "unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal"), 76.1302(j)(1) (stating that a mandatory carriage order "shall become effective upon release").

Cablevision to comply immediately with the Initial Decision before completion of the Commission’s administrative review would violate the APA.

Section 10 of the APA provides that an agency may condition judicial review of an agency action on exhaustion of agency appeals only if the “action meanwhile is inoperative.”²⁹ As the Supreme Court has explained:

Agencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be “inoperative” pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review.³⁰

This rule avoids a “fundamental inconsistency in requiring a person to continue ‘exhausting’ administrative processes after administrative action has become . . . effective.”³¹

The Communications Act expressly bars Cablevision from seeking judicial review of the Media Bureau’s HDO without first pursuing administrative review with the Commission.³² (Cablevision was also foreclosed from appealing the HDO until the Initial Decision was released.³³) As the Commission has made clear in program carriage cases, a “ruling on the merits by the ALJ must be appealed directly to the Commission.”³⁴ Cablevision is

²⁹ 5 U.S.C. § 704 (“Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative.”).

³⁰ *Darby v. Cisneros*, 509 U.S. 137, 152 (1993).

³¹ *Id.* at 148 (quoting S. Rep. No. 79-752, at 27 (1945)).

³² *See* 47 U.S.C. § 155(c)(7).

³³ 47 C.F.R. § 1.115(e)(3).

³⁴ *See In re Implementation of Sections 12 & 19 of the Cable Television Consumer Prot. & Competition Act of 1992; Dev. of Competition & Diversity in Video Programming Distrib. & Carriage*, Second Report and Order, 9 FCC Rcd. 2642, 2656 (1993).

thus obligated to appeal the HDO and the Initial Decision to the Commission before it may seek judicial review. Accordingly, to comply with section 10 of the APA, the Initial Decision must remain “inoperative” while the appeal is pending.

Here, the ALJ complied with the APA by providing for an effective date for the Initial Decision 50 days from date of release, subject to the filing of exceptions and further Commission review.³⁵ Granting GSN’s Petition to Compel would deprive Cablevision of both an inoperative Initial Decision and entitlement to judicial review, in violation of the APA.

III.

REQUIRING IMMEDIATE COMPLIANCE WITH THE INITIAL DECISION WOULD ALSO VIOLATE THE DUE PROCESS CLAUSE

Immediate compliance with the Initial Decision would violate both the Due Process clause and fundamental principles of fairness. Due process requires “the opportunity to be heard at a meaningful time and in a meaningful manner,”³⁶ including “an opportunity to ... present evidence” prior to agency action.³⁷ Cablevision will be denied due process if the Initial Decision is allowed to take effect without any consideration of its statute of limitations defense or its position that the relief ordered in the Initial Decision violates the First Amendment.³⁸

³⁵ Initial Decision ¶ 126 n.534 (citing 47 C.F.R. § 1.276).

³⁶ *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 208 (D.C. Cir. 2001).

³⁷ *Alaska Airlines, Inc. v. Civil Aeronautics Bd.*, 545 F.2d 194, 200 (D.C. Cir. 1976).

³⁸ Until recently, Cablevision could not lawfully challenge the Media Bureau’s ruling regarding the statute of limitations because it had to wait until the Initial Decision was released before it could challenge this interlocutory decision. *See* 47 C.F.R. § 1.115(e)(3). Likewise, Cablevision’s First Amendment argument was not ripe until the ALJ required Cablevision to reposition GSN. *See* HDO, 27 FCC Rcd. at 5121 n.62. This argument is even more significant today because in June 2016 Cablevision became wholly independent of WE tv and any other network with which it was formerly affiliated (other than a local news and high school sports network not at issue here). Petition to Stay at 6–7.

First, if GSN’s Petition is granted, Cablevision will be foreclosed from presenting its statute of limitations defense—an argument that turns on law that has changed significantly since the Media Bureau first addressed it. In the HDO, the Media Bureau dismissed Cablevision’s statute of limitations argument, finding GSN’s complaint timely because it was filed within one year of the “allegedly impermissible discriminatory action.”³⁹ In reaching this conclusion, the Media Bureau rejected Cablevision’s argument that the renewal of the carriage agreement between GSN and Cablevision in [REDACTED]—a carriage agreement that in fact allowed Cablevision to drop or retier the network at its discretion—had started the clock on the limitations period.⁴⁰

Since the Media Bureau’s ruling, one judge of the D.C. Circuit considered and rejected the same reasoning that led the Media Bureau to conclude that GSN’s complaint was timely under the Commission’s rules.⁴¹ In a carefully-reasoned concurring opinion in *Tennis Channel*, Judge Edwards observed that the issues raised by the statute of limitations were “very important,” and that, read properly, the Commission’s own rules granted a network “one year from the date of contract formation to file its complaint.”⁴²

³⁹ HDO, 27 FCC Rcd. at 5122. Although this issue was raised with the ALJ at the hearing, and the Enforcement Bureau advised the court that it was not prohibited from taking up the issue, the ALJ refused to address it. *See* Tr. 565:11–566:1 (Kane); Initial Decision ¶ 4.

⁴⁰ HDO, 27 FCC Rcd. at 5122.

⁴¹ *See Tennis Channel*, 717 F.3d at 995 (Edwards, J., concurring).

⁴² *Id.* at 995–96. Judge Edwards is not alone in his critique of this interpretation of the statute of limitations. In the Commission’s 2011 NPRM on the carriage rules, the Commission expressed concern that the Media Bureau’s reading of the statute of limitations “undermines the fundamental purpose of a statute of limitations to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.” *In re Revision of the Commission’s Program Carriage Rules*, Second Report and Order, 26 FCC Rcd. 11494, 11523 (2011) (internal quotation marks omitted).

The Edwards concurrence is the appropriate application of the statute of limitations in a carriage dispute under Section 616. Applied to the facts of this case, it leads to the conclusion that the statute of limitation ran one year from the date of the last agreement between Cablevision and GSN which granted Cablevision the right to drop or retier GSN in its sole discretion.⁴³ That was in [REDACTED], long before GSN filed its carriage complaint in October 2011.⁴⁴

Second, as described in Cablevision’s Petition to Stay, ordering Cablevision to carry GSN on a specific tier of service would also violate Cablevision’s First Amendment rights, an argument that has not been heard by the Commission.⁴⁵ Although Cablevision raised First Amendment arguments in its prior pleadings, both the Media Bureau and the ALJ have refused to consider the merits of these arguments to date.⁴⁶ Section 616 “regulates speech based on affiliation with an MVPD,” and is thus subject, at minimum, to intermediate scrutiny.⁴⁷ Thus, the Commission may not infringe Cablevision’s right to “determine the composition of networks on its cable systems” absent an important or substantial government interest.⁴⁸

Whatever substantial government interest existed in regulating Cablevision’s speech when the carriage complaint was brought in 2011 (and we do not concede that there was one) evaporated earlier this year when Cablevision underwent a change in control transaction

⁴³ Initial Decision ¶¶ 21, 79 n.386.

⁴⁴ 47 C.F.R. §§ 76.1302(h)(1)–(2). *See* Application for Review at 2.

⁴⁵ Petition to Stay at 16–19.

⁴⁶ HDO, 27 FCC Rcd. at 5121 n.62 (declining to include the issue in the HDO because it was “premature”); Initial Decision ¶ 118 n.526 (holding that the ALJ “is without authority to rule on Cablevision’s constitutional argument”).

⁴⁷ Petition to Stay at 16.

⁴⁸ *Id.* at 17.

that decoupled it from any programming network that is remotely “similarly situated” to GSN.⁴⁹ Cablevision is wholly independent of WE tv and any other network with which it was formerly affiliated, save local news and high school sports networks.⁵⁰ Because Cablevision’s current owner, Altice N.V., is not affiliated with any programming network similarly situated to GSN, it has no incentive to discriminate against GSN by virtue of affiliation and should, therefore, be left free to determine without government intervention whether and on what terms it will carry GSN.⁵¹ No government interest in foreclosing affiliation-based discrimination or promoting competition in video programming would be advanced by imposing a carriage remedy on Cablevision subsequent to the Altice transaction, much less the type of important government interest necessary to justify interfering with Cablevision’s editorial discretion under the First Amendment.⁵²

Notably, Cablevision has not had an opportunity to present either of these two arguments—one of which will dispose of this entire proceeding, and the other of which will foreclose any mandatory carriage remedy—to the Commission. Compelling Cablevision to carry GSN absent a hearing on these dispositive issues would violate due process.

IV.

THE STATUS QUO WILL NOT HARM GSN

GSN will not suffer further harm if its Petition to Compel is denied. Although GSN complains that Cablevision has subjected it, and the general public, to “prolonged non-

⁴⁹ *Id.* at 17–18.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 18.

compliance,”⁵³ any delay in the resolution of this matter is largely attributable to GSN’s own strategic decisions. GSN filed its complaint in October 2011, nearly a decade after the parties renewed their carriage agreement for the last time and almost a year after Cablevision told GSN it would be retired. Shortly after GSN filed its complaint, it requested temporary relief and claimed Cablevision’s decision to retire GSN would “crippl[e] GSN’s ability to develop its network” and cause “severe and likely irreparable harm to GSN’s . . . long-term viewership and competitiveness.”⁵⁴ In its Order denying GSN’s request, the Media Bureau stated that “GSN’s long delay in seeking equitable relief suggests that a stay is not necessary to prevent irreparable harm.”⁵⁵

Even after this delay was called to GSN’s attention, it did nothing to expedite the case. In fact, the parties jointly requested two extensions of the hearing date, even before the *Tennis Channel* decision was released.⁵⁶ The parties then mutually agreed to postpone trial pending the resolution of the appeal in *Tennis Channel*.⁵⁷ After the D.C. Circuit rendered its decision in that case, the parties again mutually agreed to postpone the trial to conduct further discovery and consider the decision’s impact.⁵⁸ The case was heard by the ALJ more than two-

⁵³ Petition to Compel at 8.

⁵⁴ Petition for Temporary Relief at 7.

⁵⁵ *Game Show Network, LLC*, Order, DA 11-1993 ¶ 12.

⁵⁶ *Game Show Network, LLC v. Cablevision Sys. Corp.*, Order, FCC 12M-31 (ALJ June 19, 2012) (setting a hearing date of 1/28/2013); *Game Show Network, LLC v. Cablevision Sys. Corp.*, Order, FCC 12M-47 (ALJ Oct. 15, 2012) (hearing date extended to 3/19/2013); *Game Show Network, LLC v. Cablevision Sys. Corp.*, Order, FCC 13M-3 (ALJ Feb. 28, 2013) (hearing date extended to 4/2/2013).

⁵⁷ *Game Show Network, LLC v. Cablevision Sys. Corp.*, Order, FCC 13M-7 (ALJ Mar. 26, 2013).

⁵⁸ *Game Show Network, LLC v. Cablevision Sys. Corp.*, Order, FCC 13M-12 (ALJ June 25, 2013).

and-a-half years after a hearing was initially scheduled. Not once in this lengthy period did GSN attempt to expedite the proceedings, which it surely would have done if it had truly been suffering irremediable harm at the hands of Cablevision.⁵⁹

Putting GSN's lack of urgency to one side, it is in fact the case that GSN will not be harmed by a stay preserving the status quo pending review of the Initial Decision. Cablevision has carried GSN out of contract for [REDACTED], and from the 2011 retiering through the time at issue has continued to pay GSN the [REDACTED] per subscriber per month fee under GSN's long-expired contract. Although GSN would prefer broader carriage, the record is clear that GSN has thrived since its 2011 retiering on Cablevision's systems. GSN meaningfully increased the number of its national subscribers during the pendency of this proceeding, in direct contravention of its claim at the outset of this proceeding that "Cablevision's action will irreparably harm GSN's reputation as an established national brand . . . crippling GSN's ability to develop its network."⁶⁰ Since the retiering, GSN has completed new deals with [REDACTED] and has gained approximately [REDACTED] million subscribers.⁶¹ Similarly, GSN enjoyed an unbroken string of year on year increases in revenue and operating income during the litigation of its carriage complaint.⁶² GSN promoted its

⁵⁹ GSN has continued to delay the ultimate resolution of its case. GSN recently sought, and was granted, a 10-day extension to file its opposition to Cablevision's Exceptions. *See Game Show Network, LLC*, Order, DA 16-1430.

⁶⁰ Petition for Temporary Relief at 7.

⁶¹ Tr. 609:16–610:3; 694:4–21 (Hopkins) (discussing GSN's tremendous subscriber growth since the retiering); CV Exh. 256 at 3–4. Since the retiering, according to Mr. Goldhill, [REDACTED] Tr. 219:9-12.

⁶² *See* Tr. 382:22–384:1 (Goldhill); *see also* CV Exh. 262 at 4 (GSN 2013 Review & 2014 Budget presentation).

successes; it told advertisers at its 2014-15 upfront that GSN is “bigger than ever . . . [and] stronger than ever.”⁶³ In that same vein, GSN’s advertising revenues have grown since the retiering from approximately [REDACTED] million in 2010 to [REDACTED] million in 2013.⁶⁴ On all meaningful metrics GSN has grown and thrived.

On this record, there is simply no compelling reason why the Commission should take the unprecedented step of imposing broader carriage of GSN in contravention of the express terms of the Initial Decision, the Commission’s rules and precedent and Cablevision’s First Amendment and due process rights.

⁶³ CV Exh. 325 at 7.

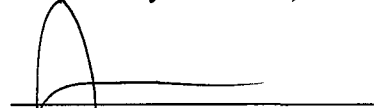
⁶⁴ See CV Exh. 256 at 10.

CONCLUSION

For the reasons set forth above, Cablevision respectfully requests that the Commission deny GSN's Petition to Compel.

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Respectfully submitted,



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